Supreme Court, U.S.
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No. 00-8452

In The

Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. GIVEN THAT ATKINS FAILED TO RAISE HIS EIGHTH AMENDMENT CLAIM IN THE VIRGINIA SUPREME COURT AND THE VIRGINIA SUPREME COURT DID NOT DECIDE ANY EIGHTH AMENDMENT ISSUE, DOES THIS COURT HAVE JURISDICTION TO CONSIDER THE CLAIM?

II. DOES THE EIGHTH AMENDMENT PROHIBIT EXECUTION OF THE MENTALLY RETARDED?

III. DOES ATKINS QUALIFY AS A "MENTALLY RETARDED" PERSON?

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STATEMENT OF THE CASE

I. The Crime[1]

At about 11:30 p.m. on August 16, 1996, after spending the day drinking with friends, Daryl Renard Atkins and William Jones walked to a Hampton, Virginia, 7-Eleven store to purchase beer. (JA 40-41, 44-45). Atkins brought with him to the 7-Eleven a gun he had borrowed from a friend, but no money; he was going to "panhandle" for beer money. (JA 45-46).

On his way home from work, Eric Nesbitt, a U.S. Air Force soldier, arrived at the same 7-Eleven at approximately 11:30 p.m. Before Nesbitt entered the 7-Eleven, Atkins spoke to Nesbitt although the two did not know each other. (JA 48-49). Nesbitt entered the store, purchased a snack and then left. As Nesbitt drove his pick-up truck out of the parking lot, Atkins "whistled" at Nesbitt and Nesbitt stopped his truck. (JA 50). Atkins approached the passenger side of the truck and Jones approached the driver's side. Atkins pointed the gun at Nesbitt and told him to "let my friend drive." Atkins and Jones each entered the truck, trapping Nesbitt in the

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[1] Atkins' statement of facts is largely written from the perspectives of two individuals: William Jones and Atkins. Atkins and Jones both testified in the guilt phase and each named the other as the "triggerman" in the murder. By finding Atkins guilty of capital murder, the jury *rejected* Atkins' self-serving testimony and credited the testimony of William Jones that Atkins alone shot and killed Nesbitt because the jury was instructed that only the "triggerman" may be convicted of capital murder. *See* Va. Code § 18.2-18. It is misleading, to say the least, for Atkins to present his statement of facts as if there is some unresolved factual question regarding Atkins' guilt.

middle between them. (JA 51). After Atkins removed sixty dollars from Nesbitt's wallet (JA 166), Jones drove the trio to an area bank where Atkins forced Nesbitt at gunpoint to withdraw $200 using his automatic teller (ATM) card. (JA 58, 167-169).

As they drove away from the bank, Jones suggested that they tie Nesbitt up and leave him someplace so that they "could get away." (JA 61). Nesbitt begged Atkins and Jones "not to hurt him." (JA 61). Atkins told Jones he "knew a place at Yorktown" near his grandfather's house and directed Jones to get on Interstate 64 and drive West toward Williamsburg. (JA 4, 62). After about thirty minutes, Atkins directed Jones to exit the interstate and they proceeded to Tower and Crafford Roads – a remote and deserted area in York County. (JA 62, 64-65, 66).

Atkins got out of the truck and ordered Nesbitt to do the same. (JA 67). Nesbitt had taken "probably two steps" when Atkins began shooting him. (JA 67). Jones tried to get out of the truck but the driver's side door had jammed. Jones "jumped out" the truck window, went around the truck and attempted to wrestle the gun away from Atkins. (JA 67, 68-69, 73). During this struggle, Atkins was shot in his left leg. (JA 69).

Jones was successful in wrestling the gun away from Atkins and the two reentered the pick-up truck. (JA 73-74). Nesbitt lay on the ground dead. (JA 74). Jones and Atkins left Nesbitt's body, and Jones drove Atkins to a hospital, asked Atkins for some money and then, still driving Nesbitt's pick-up truck, checked into a motel. (JA 75-77). When Atkins presented himself for treatment at the hospital, he "calmly" told the duty nurse that he had

been the victim of an attempted robbery directly in front of the hospital and had hopped to the emergency department of the hospital. (JA 23-24). The duty nurse observed no signs that Atkins was intoxicated.[2]

Around 3:45 a.m. on August 17, 1996, Garland Clay was driving home when he discovered Nesbitt's body. (T.T., 2-10-98, pp. 140-141). After Clay phoned the police, Investigator Frederick Lyons responded to the scene and found six shell casings on the ground. (T.T., 2-10-98, p. 192). Lyons also discovered Nesbitt's ATM card, checked with the bank and discovered the $200 withdrawal. (JA 6). He obtained photographs of the transaction (see Lodging to JA at L1-L48) which were distributed to the local media along with a "crime line phone number" for citizens to call. (JA 7, 11). Five citizen callers identified Jones from the photographs and one caller informed the police that Atkins "ran with Jones." (JA 7). The police arrested Atkins on August 21, 1996. (JA 7-8, 11). They found Nesbitt's truck in the parking lot of the motel where Jones had driven after the murder. (JA 9; T.T., 2-11-98, pp. 146-147).

The Medical Examiner determined that Nesbitt had sustained eight separate gunshot wounds to his thorax, chest, abdominal area, arms and legs. (T.T., 2-11-98, p. 83). Many of the bullets had exited and then reentered Nesbitt's body, resulting in eighteen distinct entrance/

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[2] For instance, the nurse testified that she did not detect an odor of alcohol on Atkins, that he "was not waving in his gait, even though he was on one foot . . . [and] [h]is speech was not slurred." (Trial Transcript, hereinafter T.T., 2-11-98, p. 70).

exit wounds. (*Id.* at 86, 88). Three of the gunshots perforated Nesbitt's lungs, heart and aorta, caused massive internal hemorrhaging, and were "lethal." (*Id.* at 86, 88, 96). Two other bullets were found in Nesbitt's abdomen and shoulder.

II. The Trial And First Appeal

Prior to trial, Atkins was examined by Dr. Evan Nelson, a psychologist appointed on his behalf. Nelson concluded that Atkins was mildly mentally retarded, with a full-scale I.Q. of 59.[3] (JA 269). At trial, Nelson admitted that Atkins' I.Q. score may "have been slightly higher if [Atkins] were not mildly depressed" at the time he took the test.[4] (JA 308). Nelson concluded that Atkins fully appreciated the criminality of his conduct and could conform his conduct to the requirements of the law if he so desired and thus was not insane or incompetent at the time of the offense. (JA 289, 290, 309).

Atkins was tried in the York County Circuit Court in February, 1998, for the capital murder of Eric Nesbitt in the commission of robbery while armed with a deadly weapon.[5] In addition to the evidence outlined above, the

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[3] It is undisputed that Atkins, who was twenty at the time of trial, never had been previously diagnosed as mentally retarded.

[4] On direct examination, Nelson admitted also that "certainly" people can fake a lower score on an I.Q. test. (JA 272).

[5] Atkins also was charged with abduction with intent to extort money, robbery, use of a firearm in the commission of abduction and use of a firearm in the commission of robbery.

Commonwealth presented the testimony of Stephen Burton, a cellmate of Atkins. According to Burton, Atkins admitted that he "had put a boy out of a truck in York County [and] that he had shot at the boy." Atkins, however, "wasn't particularly worried about it [because all the Commonwealth] had on him was a picture of him at an ATM machine holding a gun at the boy." (T.T., 2-12-98, pp. 236-237).

Atkins testified articulately on his own behalf, informing the jury that, although he fully participated in the abduction and robbery of Nesbitt, it was William Jones who shot Nesbitt while Atkins waited in the hijacked truck.[6] As noted, the jury rejected Atkins' testimony and found him guilty of premeditated murder in the commission of robbery.

In the separate sentencing proceeding, the Commonwealth presented evidence of Atkins' 25 prior felonies as well as the testimony of several victims of Atkins' prior crimes as proof of Atkins' "future dangerousness." (JA

Prior to trial, Atkins pled guilty to those offenses. (T.T., 2-9-98, pp. 2-15).

[6] DNA and blood evidence from inside the victim's truck established that the murder simply could not have occurred as Atkins testified. According to Atkins, he was shot in his left leg by Jones, and Jones shot Nesbitt while Atkins waited inside the truck on the "passenger side." (JA 172). The passenger seat, however, was covered with *Nesbitt's* projected blood (T.T., 2-11-98, pp. 246-247; T.T., 2-12-98, pp. 27, 57-58, 60) – a fact making Atkins' version an impossibility. In addition, no blood was found on the transmission hump of the truck. (T.T., 2-11-98, pp. 270-271). According to the blood spatter expert, if someone had been shot while sitting inside the truck, "you would expect to see impact spatter." (*Id.*).

220-240, 294-301). The defense presented the testimony of Dr. Nelson, who opined that Atkins was mildly mentally retarded. He suggested that, in a structured prison setting away from alcohol and drugs, Atkins' risk for future violent behavior could decrease. (JA 283-284).

The jury sentenced Atkins to death, finding that he represented a continuing serious threat to society and that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim. (T.T., 2-14-98, pp. 212-213). In the post-verdict hearing, the trial judge imposed the death sentence. (T.T., 4-28-98, pp. 35-37). The court also sentenced Atkins to two life terms for the robbery and abduction and to five years each on the two firearms offenses. (*Id.*).

The Supreme Court of Virginia affirmed Atkins' convictions but reversed his death sentence, concluding that an improper sentencing verdict form required a remand to the trial court for resentencing on the capital murder conviction. *Atkins v. Commonwealth*, 510 S.E.2d 445 (Va. 1999) (*Atkins I*).

III. The Resentencing

Prior to the start of the resentencing, Atkins was evaluated by another mental health expert, Dr. Robert S. Brown, Jr. (JA 319). Dr. Brown found that Atkins demonstrated a "clear understanding" of the proceedings and the ruling by the Supreme Court of Virginia. (JA 328). At Dr. Brown's urging, Atkins identified several persons as possible mitigation witnesses. (JA 329). Dr. Brown concluded that Atkins had the "ability to learn and remember," possessed "the capacity to understand the legal

proceedings against him," and was "competent to assist his attorneys." (JA 331, 335-336).[7]

At the resentencing, the Commonwealth again presented the evidence surrounding Nesbitt's murder, Atkins' 25 prior felonies and testimony from Atkins' victims. Amanda Hamlin testified that, as she was outside one evening mowing her yard, Atkins "slapped a gun up against [her] face," dragged her off her lawnmower, hit her again with the gun, "put the gun to [her] stomach and shot [her]." (JA 411-412). Dennis Tuninei, Shane Stoops and John Hultquist testified Atkins robbed them at gunpoint as they were using a pay phone and that Atkins had hit Tuninei in his head with a broken bottle. (JA 405-406, 407, 408).

Kevin Phillips testified that, as he was delivering a pizza to a house in Hampton, Virginia, three men approached him, put a gun to his head, forced him to crawl to his car and drove him to a swamp. (JA 409; T.T., 8-19-99, pp. 155-159). On the drive to the swamp, his captors debated whether to kill him. At the swamp, they told him to "lay on the ground . . . and the gun was put in [his] back." (T.T., 8-19-99, p. 158). They then told him to get up and that he "had five seconds to run" before he was killed. (*Id.* at 158-159). Atkins was charged and

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[7] Contrary to Atkins' assertion at note 6 of his brief that he "had failed driver's education twice," Atkins reported to Dr. Brown that he did not possess a valid driver's license and *never had attempted to obtain one*. When asked why, Atkins told Brown that he chose to use the bus system as his primary mode of transportation. (JA 325).

convicted of abduction, use of a firearm and robbery arising out of this incident. (JA 569).

Atkins again presented the testimony of Dr. Evan Nelson. Nelson again opined that Atkins' I.Q. was 59, placing him in the mildly mentally retarded range. (JA 438). Nelson's opinion, again, mostly was based on Atkins' recently obtained I.Q. score of 59. (JA 438-439, 611). Nelson again explained that Atkins could have "scored a little higher" on the I.Q. test if he had not been mildly depressed at the time he took the test and that, in a structured prison setting away from alcohol and drugs, Atkins' risk for future violent behavior could decrease.

In rebuttal, Dr. Stanton E. Samenow disagreed with Nelson, opining that Atkins was of average intelligence and not mentally retarded. (JA 476). Dr. Samenow testified that, according to the leading text on mental disorders, the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM-IV),[8] there are, besides age, two criteria for a diagnosis of mental retardation: significant subaverage intellectual functioning and concurrent impairments in adaptive functioning. Regarding Atkins' adaptive functioning, Samenow stated:

> [Atkins] told me he was able to wash his clothes, wash and dry his clothes, he used his parents' washing machine and dryer. He told me – when I asked him if he was able to cook, he gave me his recipe for cooking chicken.

[8] The DSM-IV has been updated by the DSM-IV-TR (text revision). The criteria for mental retardation, however, remain the same.

> This Defendant . . . lived a life in which he didn't work, and I don't mean just didn't hold a job, that he didn't do, but then again there are a lot of 18-year-olds who maybe haven't worked because they've been in school. But he didn't work in school either.
>
> So the point is he chose a certain – to live a certain way of life, and *there was no lack of ability to adapt and to take care of basic needs, certainly.*[9]

(JA 483-484) (emphasis added).

At the conclusion of the evidence and with Atkins' agreement, the jury was instructed as follows:

> The Court instructs the jury that if you find that the Commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance, in determining the appropriate punishment you should consider any evidence presented in mitigation and/or of circumstances which do not justify or excuse the evidence but which, in fairness or mercy, may extenuate or reduce the degree of moral culpability and punishment which tends to make life imprisonment

[9] Samenow noted that Atkins used "sophisticated" words with the proper tenses during their conversations, could make change, had a good grasp of history and did better on the intelligence tests if "pushed just a little." Samenow concluded that, in school, Atkins "was a person who chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do." (JA 481).

without possibility of parole a more appropriate punishment than death.

(T.T., 8-19-99, p. 97).[10]

Atkins argued to the jury that his mild mental retardation made him less culpable, that "Virginia State law has mandated mental retardation as a valid mitigating factor," and urged the jury to sentence him to life without the possibility of parole. (*Id.* at 113). The jury sentenced Atkins to death, finding that he represented a continuing serious threat to society and that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim. (*Id.* at 128). In the post-verdict hearing, the trial judge imposed the death sentence. (T.T., 10-26-99, pp. 3-15). Atkins never made any motion or argument to the resentencing court that his execution was unconstitutional because of his purported 59 I.Q.

IV. The Second Appeal

On March 7, 2000, Atkins filed the assignments of error "upon which he intended to rely for reversal of his conviction." *See* Rule 5:22, *Rules of the Supreme Court of Virginia*. Atkins listed no assignment of error that it was unconstitutional to execute the mentally retarded (JA 601-604); neither did he make any such claim in his opening brief. Instead, he argued that his sentence was

[10] Atkins proffered, but later expressly withdrew, a request for an instruction which specifically told the jury that mental retardation "should" be considered a mitigating factor. (T.T., 8-19-99, p. 68).

disproportionate under Virginia Code § 17.1-313 because he was "unable to find a case in Virginia in which an individual with an IQ of 59 has been sentenced to death." Expressly noting the "conflicting evidence" on the question of whether Atkins was mentally retarded, the Virginia Supreme Court rejected his proportionality challenge – as well as his other claims of error – and affirmed Atkins' death sentence. *Atkins v. Commonwealth*, 534 S.E.2d 312 (Va. 2000) (*Atkins II*). In his petition for rehearing, Atkins made no argument that his death sentence was unconstitutional because of his alleged I.Q. On November 3, 2000, the Supreme Court of Virginia denied the petition for rehearing in an unpublished order.

SUMMARY OF THE ARGUMENT

It should be a rare event for this Court, under the Eighth Amendment, to impose a permanent prohibition upon a State's ability to punish an entire class of offenders with the death penalty, especially when no Eighth Amendment claim ever was presented to the state court. However, even putting aside the issue of this Court's jurisdiction, such a decision by this Court requires a "national consensus so broad, so clear and so enduring," *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989), as to be beyond all legitimate question.

In the case of mentally retarded offenders, this Court *already* has decided that such a sweeping prohibition is not required under the Eighth Amendment because execution of the mentally retarded is not cruel and unusual. *Penry v. Lynaugh*, 492 U.S. 302 (1989). In categorically

rejecting the argument that it is cruel and unusual to execute the mentally retarded, this Court concluded that execution of the mentally retarded was not prohibited by the Eighth Amendment at the time the Bill of Rights was adopted, did not contravene the "evolving" standards of decency that mark the progress of a maturing society, and, because of the "heterogeneous" nature of the retarded population, execution of the mentally retarded could not be said to make no measurable contribution to the valid penological goals of deterrence and retribution. Over twelve years later, the same still holds true: society's legitimate interests in deterrence and retribution are served by the execution of mentally retarded offenders who have the ability to plan and carry out a capital murder, and such executions do not contravene the "evolving" standards of decency.

Just as in 1989, moreover, mentally retarded persons today do not "inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Penry*, 492 U.S. at 338. Objective evidence supplied by the judgments of state legislatures, moreover, establishes that, just as in 1989, there is no "national consensus" today against execution of the mentally retarded. A full twenty-nine of the thirty-eight States which authorize the death penalty permit it to be imposed on at least some, if not all, mentally retarded capital murderers. Society has not clearly "set its face against" such punishment, *Stanford*, 492 U.S. at 378, and, thus, it cannot be said to be cruel and unusual.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER ATKINS' EIGHTH AMENDMENT CLAIM.

The entire record below, including the brief filed by Atkins and the lower court's full opinion, makes clear that the issue the court below was asked to decide was whether a death sentence in Atkins' case was disproportionate to sentences in other similar Virginia cases, a fundamentally different question from the issue of whether the Eighth Amendment categorically prohibits execution of the mentally retarded. Atkins' claim thus may not now be considered. *See Hill v. California*, 401 U.S. 797, 805 (1971) (a federal claim cannot be considered by the Court unless it either has been raised in the state court or considered and resolved by the state court).[11]

In his response to the Commonwealth's motion to dismiss, Atkins contended that the Commonwealth had conceded below that Atkins properly raised the Eighth Amendment claim. Whether or not the Commonwealth made such a concession, however, is irrelevant to a determination of this Court's subject matter jurisdiction

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[11] After certiorari was granted, the Commonwealth filed a motion to dismiss the writ as improvidently granted. The Commonwealth contended that although Atkins had raised on direct appeal his mental retardation in conjunction with his state law claim that his death sentence was disproportionate to other Virginia cases, he never had raised a free-standing claim that under the Eighth Amendment it was cruel and unusual to execute the mentally retarded. Atkins filed a response and on October 29, 2001, this Court *summarily* denied the motion to dismiss.

because jurisdiction cannot be conferred onto this Court by consent or default. *See Sochor v. Florida*, 504 U.S. 527, 535 n.* (1992). *See also Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 622 (1996) ("[W]e are not bound to decide a matter of constitutional law based upon a concession by the particular party before the Court as to the proper legal characterization of the facts.").

The "opinion[ ] of the lower court[ ], and the parties' briefs in [that court] did not squarely isolate, and address [the Eighth Amendment claim]." *Colorado Republican Campaign Committee*, 518 U.S. at 624. In fact, it was only on appeal below and only in conjunction with his assertion that his sentence was disproportionate under Virginia Code § 17.1-313 that Atkins even mentioned his alleged mental retardation. (JA 601). Atkins now implicitly concedes the point when he repeatedly acknowledges that the Supreme Court of Virginia discussed his alleged mental retardation *solely in conjunction with its proportionality review*. (*See* Atkins Br. at 46: "In finding that his death sentence was not excessive and disproportionate, the majority of the Virginia Supreme Court never clearly states its view of Daryl Atkins's mental condition;" *id.* at 46-47: in conducting its proportionality review, "the majority makes no ultimate choice between the conclusions of Dr. Nelson and Dr. Samenow."[12]).

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[12] Of course, the reason the state court did not "state its view of [ ]Atkins's mental condition," is because it had before it no Eighth Amendment issue that required a determination of the defendant's intelligence level. *See Commonwealth v. Harley*, 504 S.E.2d 852, 854 (Va. 1998) (Virginia Supreme Court "traditionally declines" to render advisory opinions).

Indeed, in the court below, Atkins conceded that, under current law, the Eighth Amendment does not prohibit execution of the mentally retarded, and, most importantly, *never argued, as he does now, that that current law should be overturned*. (*See* App. to Pet. for Writ of Cert. at 131). Atkins' argument below never mentioned any federal constitutional error and the Virginia Supreme Court, as Atkins now acknowledges, specifically and solely considered only what it was asked to consider: whether Atkins' alleged mental retardation rendered his sentence disproportionate under § 17.1-313(C) to other capital cases in Virginia:

> Thus, considering "both the crime and the defendant," Code § 17.1-313(C), and the record before us, we cannot say that Atkins' sentence of death is excessive or disproportionate to sentences generally imposed in this Commonwealth for capital murders comparable to Atkins' murder of Nesbitt. We are not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score. Dr. Nelson and Dr. Samenow agreed that an IQ score is not the sole definitive measure of mental retardation. Both experts also testified that Atkins was able to appreciate the criminality of his conduct and understood that it was wrong to shoot Nesbitt.
>
> Accordingly, we perceive no reason to commute Atkins' sentence of death and will affirm the judgment of the circuit court.

Atkins II, 534 S.E.2d at 321.[13] Again, the court never decided the Eighth Amendment issue because it never

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[13] Justice Hassell's dissenting opinion below makes expressly clear that the Court was *not* deciding any federal issue:

was asked to do so.[14] Accordingly, this Court has no jurisdiction to consider it. *See Michigan v. Long*, 463 U.S. 1032, 1039 (1983); *Yee v. Escondido*, 503 U.S. 519, 533 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983); Sup. Ct. R. 14.1(g)(i).[15]

I recognize that the United States Supreme Court has held that the imposition of the death penalty upon mentally retarded criminal defendants does not violate the Eighth Amendment to the United States Constitution. *See Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). However, *the issue in this appeal is not whether the imposition of capital punishment upon a mentally retarded defendant violates the federal Constitution.* Rather, the issue in this appeal is whether under Code § 17.1-313 the imposition of the sentence of death is excessive or disproportionate to the penalty imposed in similar crimes, considering both the crime and the defendant.

Atkins II, 534 S.E.2d at 324 (emphasis added).

[14] Atkins argued to the jury, as was his right under Virginia Code § 19.2-264.4(B)(vi) and *Penry*, that his alleged mental retardation *mitigated* against a death sentence, but he made no motion or argument before, during or after his trial or sentencing that his alleged mental retardation *prohibited* imposition of the death penalty, much less that the Eighth Amendment forbade it. Had Atkins assigned the Eighth Amendment claim as an error and argued it on direct appeal, there is no doubt that the Supreme Court of Virginia would have applied its contemporaneous objection rule, Rule 5:25, to bar consideration of the claim because Atkins *never raised it in the trial court.*

[15] *See also Beck v. Washington*, 369 U.S. 541, 553 (1962) (noting that jurisdiction is not proper where error is not assigned to the issue and the matter is not briefed in the state court).

II. THE EIGHTH AMENDMENT DOES NOT PROHIBIT EXECUTION OF THE MENTALLY RETARDED.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), this Court considered and rejected the notion that the Eighth Amendment categorically prohibits the execution of mentally retarded capital murderers. The Court explained that execution of the mentally retarded was not prohibited by the Eighth Amendment at the time the Bill of Rights was adopted. *Penry*, 492 U.S. at 331-333. And, in keeping with settled Eighth Amendment jurisprudence, *see Trop v. Dulles*, 356 U.S. 86, 101 (1958), the Court concluded that execution of the mentally retarded did not contravene the "evolving standards of decency that mark the progress of a maturing society." Noting that only one State had passed legislation barring such executions in 1989, the Court held that "while a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today." *Penry*, 492 U.S. at 340. The Court expressly relied upon the "heterogeneous" nature of the retarded population in rejecting Penry's argument that imposition of the death penalty on the mentally retarded allegedly made no measurable contribution to the penological goals of deterrence and retribution.

Atkins insists that, despite this Court's opinion in *Penry*, execution of the mentally retarded contravenes the Eighth Amendment because it does not measurably contribute to the penological goals of deterrence and retribution. He argues also that, in the twelve years since *Penry*

was decided, a national consensus has emerged against the execution of mentally retarded persons because seventeen additional States have enacted legislation regarding the execution of capital defendants who are mentally retarded.

Clearly though, the mentally retarded are still a "heterogeneous" group with "diverse capacities and life experiences," *Penry*, 492 U.S. at 338; thus the penological goals of deterrence and retribution still are served by imposition of the death penalty on some individuals who happen to be mentally retarded. Moreover, Atkins' methodology of "State-counting" is severely flawed and does not support his bid for a new, sweeping rule of constitutional law dictating that the mentally retarded may not be punished by death for a capital crime. No national consensus exists today against the execution of capital defendants who are mentally retarded but who, like Atkins, have the mental capacity to plan, premeditate and deliberate with a specific intent to kill, understand the proceedings against them, are able to assist in their own defense and know the difference between right and wrong.[16]

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[16] The Court recognized in *Penry* that the common law prohibition against punishing "idiots" for their crimes might make it cruel and unusual to execute profoundly or severely retarded persons who lack the capacity to appreciate the wrongfulness of their conduct. The Court also recognized, however, that because of "the protections afforded by the insanity defense" and *Ford v. Wainwright*, 477 U.S. 399 (1986), the profoundly and severely mentally retarded were not likely to be convicted or face the prospect of punishment. *Penry*, 492 U.S. at 333. The protections of the insanity defense and of *Ford* still are in place and are complemented by the rule announced in *Penry*: a jury must be allowed to consider a capital defendant's mental retardation as mitigating evidence. *Id.* at 328. Unquestionably, the Court's observation in 1989 that the profoundly and severely mentally retarded are unlikely to be convicted or sentenced, still is true and, just as in *Penry*, "such a case is not before [the Court] today." It is unchallenged that Atkins, like Penry, is neither profoundly nor severely retarded and was found competent to stand trial and competent at the time of the offense.

A. Mentally Retarded Capital Murderers Are Distinct Individuals Whose Culpability And Eligibility For The Death Penalty Are Assessed Best On A Case-By-Case Basis.

The mentally retarded are not an homogeneous category of easily interchangeable persons. They are not "all cut from the same pattern . . . they range from those whose disability is not immediately evident to those who must be constantly cared for." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985). Indeed, the leading clinical text, the American Psychiatric Association's *Diagnostic And Statistical Manual Of Mental Disorders* (Text Revision, 4th ed., 2000) ("DSM-IV-TR") divides the mentally retarded into four distinct categories: mildly mentally retarded, moderately mentally retarded, severely mentally retarded and profoundly mentally retarded. The overwhelming majority of mentally retarded persons – a full 85% – fall into the "mild" category. *See* DSM-IV-TR at 43; *Penry*, 492 U.S. at 333. Many of these mildly mentally retarded individuals are high functioning persons. Such persons, if they commit capital crimes, "clearly act with the level of culpability associated with the death penalty."

Penry, 492 U.S. at 339. Thus, "an individualized determination whether 'death is the appropriate punishment' " can and should continue to "be made in each particular case." *Id.* at 310.

1. The mentally retarded are not a homogenous group.

Atkins improperly "regard[s] those on the retarded side of the fence as a homogenous group of organisms defective in all spheres of functioning and forever separated by their very nature from all persons possessing higher I.Q.'s." Edward Zigler, *Personality Development in Individuals with Mental Retardation, in The Individual With Mental Retardation As A Whole Person* 14 (1999) (*Whole Person*); (Atkins Br. at 22-26, 28-32). That argument, however, previously has been presented to this Court and properly rejected. *Penry*, 492 U.S. at 338 ("some [mentally retarded individuals] are fully capable of learning, working and living in their communities.").[17]

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[17] In support of his "homogeneity" argument, Atkins depends almost exclusively on the definition of mental retardation which was adopted by the American Association on Mental Retardation (AAMR) after *Penry*. *See* AAMR, *Mental Retardation: Definition, Classification, And Systems Of Support* (9th ed., 1992); (Atkins' Br. at 22-23, 24, 25). The AAMR's definition of mental retardation, however, altogether disregards the subclassifications in the DSM-IV-TR and has been criticized heavily. *See, e.g.*, Stephen Greenspan, *Dead Manual Walking? Why the 1992 AAMR Definition Needs Redoing*, 32(3) Education & Training In Mental Retardation & Developmental Disabilities 179-190 (1997) (discussing problems in process of developing the definition which contributed to final flawed product); Frank M. Gresham et al., *Critical Analysis of the 1992 AAMR Definition: Implications for School Psychology*, 10(1) School Psychology Quarterly 1-19 (1995) (discussing several challenges the new definition presents to school psychologists in assessing and classifying intelligence, adaptive behavior, and intensities of needed supports); Johnny L. Matson, *Comments on Gresham, MacMillan, & Siperstein's Paper "Critical Analysis of the 1992 AAMR Definition: Implications for School Psychology"*, 10(1) School Psychology Quarterly 20-23 (1995) (acknowledging that the AAMR apparently has abandoned a pragmatic/scientific definition in favor of one that is primarily political and which espouses the "rights" philosophy which has become prominent in the general field of developmental disabilities and noting that the approach of the AAMR appears to be antithetical to science and may promote more inaccuracies in diagnosis). In addition, individuals with mild mental retardation are not well represented in the AAMR's definitions, and there is a mismatch between the AAMR's own definition of mental retardation and the domains measured by the AAMR adaptive behavior scale. *See, e.g.*, Terry Stinnett, *"AAMR Adaptive Behavior Scale-School": Test Review*, 15(4) Journal Of Psychoeducational Assessment 361-372 (1997); *Construct Validity of the AAMR Adaptive Behavior Scale-School 2*, 28(1) School Psychology Review 31-43 (1999).

Every retarded person "has a personality – a complex array of motivational and emotional features that permeate his or her everyday functioning." *Whole Person* at 8; *see Penry*, 492 U.S. at 338 (noting that "[m]entally retarded persons are individuals whose abilities and experiences can vary greatly."). Since this Court decided *Penry*, nothing has changed: it is equally true today that while differing in cognitive functioning from the nonretarded, the mentally retarded have not somehow forfeited their individuality but still are a diverse class of "whole" persons, each with their own individual strengths and weaknesses. *Whole Person* at 8-9, 12.

The practical individualism of mentally retarded persons still is acknowledged by the American Psychiatric Association. As noted, mentally retarded individuals still are classified as mildly, moderately, severely or profoundly retarded. These classifications reflect the level of the person's intellectual impairments and social/adaptive functioning. DSM-IV-TR at 42; *Penry*, 492 U.S. at 308 n.1; *accord* Brief for amici *American Psychological Association, et al.* (APA) at 6, n.3 (acknowledging that individuals with mental retardation have varying skills, and noting the four subclassifications in the DSM-IV-TR).

Persons with mild mental retardation constitute the largest segment (about 85%) of those with mental retardation. According to the DSM-IV-TR:

> As a group, [mildly mentally retarded] people typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

DSM-IV-TR at 43.

Clearly, high functioning individuals exist within the group of individuals with mild mental retardation. This is due, in part, to the fact that the level of functioning obtained by persons with mild mental retardation often improves over time. Indeed, it is the position of the American Psychiatric Association that "mental retardation is not necessarily a lifelong disorder." *See* DSM-IV-TR at 47 ("Individuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of Mental Retardation."). *See also* Kevin S. Mcgrew et al., *Relationship Between Measures of Adaptive Functioning & Community Adjustment for Adults with Mental Retardation*, 58(6) Exceptional Children 517-529 (1992) (investigating relation between measures of adaptive/maladaptive behavior and community adjustment in 239 adults with mild to severe mental retardation and noting their successful integration in community as defined by economic independence, independence in daytime activities and living arrangements, and independence from community support systems); James R. Patton et al., *Individuals with Mild Mental Retardation: Postsecondary Outcomes & Implications for Educational Policy*, 31(2) Education & Training In Mental Retardation & Developmental Disabilities 75-85 (1996) (discussing four important outcomes for students with mild mental retardation: successful employment, development of independence, acquisition of life skills, and successful involvement with school and community); Robert H. Bruininks et al., *Adaptive Behavior & Mental Retardation*, 21 Journal Of Special Education

69-88 (1987) (reviewing construct of adaptive behavior and examining role of community environmental factors in adaptive functioning of mentally retarded persons); Samuel F. Redding, *Life Adjustment Patterns of Retarded & Nonretarded Low Functioning Students*, 45 Exceptional Children 367-68 (1979) (comparing life adjustment of 20 mildly mentally retarded adults and 20 low-functioning students 3-5 years after both groups had graduated from high school and finding that employment status and life adjustment of the mildly mentally retarded subjects were impressive when contrasted with earlier notions about the gross inadequacies of the mentally retarded); Robert B. Edgerton, *Retarded People of Adult Years*, 19(4) Psychiatric Annals 205-09 (1989) (noting that most mentally retarded persons can achieve a semi-independent life if given sufficient time to learn coping skills and if they have support of other persons); Andrea G. Zetlin et al., *Adaptation through the Life Span, in Handbook Of Mental Retardation & Development* (Jacob A. Burack et al. eds., 1998).

Moreover, these high functioning individuals are adults, not children. They hold jobs, own houses, and live in stable co-habitation. *See, e.g.*, B. Maughan, et al., *Mild Mental Retardation: Psychosocial Functioning in Adulthood*, 29 Psychological Medicine 351-366 (1999). It is both inaccurate and demeaning to these adults (and antithetical to the professed goals of the AAMR and other groups working with the mentally retarded) to equate them with children or automatically describe those few of their number who commit aggravated murders as too immature, incapable of moral understanding and lacking in individual culpability to be eligible for the punishment of

death. *See* AAMR, *Mental Retardation Defined And Explained: Definition, Classification & Systems Of Support* 7 (1992) ("Virtually all persons with mental retardation will improve in their functioning as a result of effective supports and services. This improvement will enable them to be more independent, productive, and integrated into their community."). Indeed, even Atkins' amici agree that "[i]t is increasingly accepted that people with mental retardation can be productive, contributing citizens of their communities, and that their integration into those communities should be a goal of governmental policies." Brief for amici *AAMR et al.* at 20.

2. The mentally retarded are entitled to be assessed and judged on an individual basis.

Because no two mentally retarded capital defendants are alike, their individual culpability and eligibility for the death penalty should continue to be assessed on a case-by-case basis. An individualized sentencing determination is the bedrock of the Eighth Amendment. *Jurek v. Texas*, 428 U.S. 262 (1976). "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

Mentally retarded capital defendants who proceed to sentencing mostly are in the mildly mentally retarded

subclass. *Penry*, 492 U.S. at 333.[18] They generally have been found to have the ability to assist their lawyers and to have a rational and factual understanding of the proceedings against them. In keeping with this Court's Eighth Amendment jurisprudence, as well as the professed goals of the AAMR and other similar groups, mentally retarded capital defendants are entitled to be judged *individually*.

Society's legitimate goals of deterrence and retribution likewise are served by such individual judgment. Just as "[i]t is rational" to conclude that some 16-year-olds are adequately deserving of, or significantly deterred by, imposition of the death penalty, *Stanford*, 492 U.S. at 378, so too it is rational to conclude that some mentally retarded persons are adequately deserving of, or significantly deterred by, imposition of the death penalty. In fact, the goal of deterrence is best served if the capital defendant can appreciate the consequences of his actions and understand the link between his actions and the punishment. *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988). Even Atkins does not contend that the intellectual impairments suffered by retarded persons always render them unable to appreciate the criminality of their actions or understand the nature of their punishment and why they are to suffer it. (Atkins Br. at 33: "the intellectual impairments suffered by mentally retarded persons *'dramatically reduce'* their ability to engage in the sort of reasoning process that is a necessary precondition" to

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[18] As noted earlier, a profoundly or severely retarded individual is not likely to be convicted or face the prospect of punishment. *See* note 14, *supra*.

deterrence). Atkins' own case underscores the point: during his psychiatric evaluation prior to resentencing, he indicated that he understood the jury was limited under Virginia law to sentencing him either to life or death for his murder of Eric Nesbitt and he further indicated that he "hoped" for a life sentence from the jury. (JA 330). Atkins thus clearly appreciated the criminality of his actions, the nature of the punishments and why he was to be punished.

Likewise, "the heart of the retribution rationale is that a criminal sentence must directly be related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). Regarding the mentally retarded, this Court has stated: "[i]n light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said . . . that all mentally retarded people, by definition, can never act within the level of culpability associated with the death penalty." *Penry*, 492 U.S. at 338-339. Nothing has changed since the decision in *Penry*: retarded persons still lead varied existences and still are categorized by the leading text in the field as ranging from mildly mentally retarded to profoundly mentally retarded. Thus, the retarded, especially the mildly mentally retarded, still possess the "level of culpability associated with the death penalty." *Id.*

3. Constitutional and statutory safeguards currently in place adequately protect the interests of mentally retarded capital defendants.

Atkins argues that a blanket proscription against execution of the mentally retarded is necessary because "experience since *Penry I* has demonstrated" that the mentally retarded are at risk for a death sentence despite "*Penry*'s assurance that the mentally retarded can plead their disability in mitigation." (Atkins Br. at 34). Atkins misunderstands the critical holding of *Penry*. *Penry* did not hold that capital murderers who pled "their disability in mitigation" constitutionally are exempt from the death penalty. *Penry* merely held that, under the Eighth Amendment, juries must be able to consider any mitigating evidence relevant to a defendant's background and character, including evidence of mental retardation. *Penry*, 492 U.S. at 329. Thus, it is permissible under *Penry* for juries to sentence to death mentally retarded persons as long as the defendant is given the opportunity to present, and the jury to consider, the defendant's mental retardation as mitigating evidence.

Atkins misses the point when he argues that the "procedural protections" afforded to all criminal defendants somehow "breakdown" when the defendant is mentally retarded. (Atkins Br. at 34).[19] Atkins' argument

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[19] Atkins asserts that this "breakdown" in the process is "compounded by the well-known and extraordinarily tenacious desire" on the part of the mentally retarded individual that no one learn of his impairment. (Atkins Br. at 36). Atkins, however, told Dr. Brown prior to his resentencing that he had no objection

fails to acknowledge the fact that capital defendants who claim to be mentally retarded are protected by a criminal justice system offering a multitude of opportunities to raise the defense. In Virginia, a mentally retarded capital defendant must be competent to stand trial. In other words, it must be clear that he has the "substantial capacity to understand the proceedings against him and to assist his attorney in his own defense." *See* Va. Code § 19.2-169.1. At the guilt phase of trial, the defendant may present evidence of mental disease or defect to support a defense of not guilty by means of insanity at the time of the offense. *See* Va. Code § 19.2-169.5. The Commonwealth must prove beyond a reasonable doubt that a mentally retarded capital defendant acted with premeditation and deliberation. *See* Va. Code § 18.2-31 (defining capital murder as "willful, deliberate and premeditated killing. . . . "). At sentencing, the Commonwealth must prove beyond a reasonable doubt either that the mentally retarded capital murderer will be a danger in the future or that his crime was vile. *See* Va. Code § 19.2-264.4. Additionally, a mentally retarded capital murderer must be sane at the time of his execution, *i.e.*, he must know that he is sentenced to death and he must understand why he is sentenced to death. *See Ford*, 477 U.S. at 422.

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to the jury knowing about his mild mental retardation, "if it would help." (JA 329). Atkins also asserts that this purported "breakdown" in the process leads the mentally retarded to falsely confess and sometimes to conviction of the innocent. (Atkins Br. at 35). But, Atkins' own confession belies this assertion: Atkins did *not* confess to the murder of Eric Nesbitt but instead named his co-defendant, William Jones as the triggerman in Nesbitt's murder.

Mentally retarded capital defendants, moreover, are entitled to present evidence of, and instruct the jury that, their mental retardation is a factor mitigating against a death sentence. *Penry*, 492 U.S. at 327-328. Mental retardation is a statutorily enumerated mitigating factor in Virginia. Va. Code § 19.2-264.4(B)(vi). Mentally retarded capital defendants constitutionally are entitled to competent lawyers to represent them and, in the majority of cases, experienced mental health experts to investigate and evaluate their individual circumstances and backgrounds and to advocate on their behalf. *See Ake v. Oklahoma*, 470 U.S. 68 (1985); *see also* Va. Code § 19.2-264.3:1 (giving every indigent capital murder defendant in Virginia the unqualified right to such expert upon request). And a capital murderer who is sentenced to death may raise the issue of his mental retardation as a reason to extend mercy and for commutation of sentence and/or a full pardon in a petition for clemency addressed to the Governor.[20]

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[20] Atkins asserts that juries "often have difficulty understanding the intellectual and behavioral deficits characterizing a defendant with mental retardation." (Atkins Br. at 36). Atkins ignores the fact that there are numerous mental health experts willing and able to explain fully the mentally retarded defendant to a jury and that in the majority of instances, these experts are appointed to assist the defendant *free of charge* and are often of the defendant's own choosing. Amicus APA dismisses juries as "incapable of understanding sentencing instructions[.]" (Br. for amicus APA at 10 n.12). Jurors, of course, need not be specially trained psychologists in order to understand that a capital defendant's mental retardation is a fact that they can consider in mitigation.

Atkins asserts that time has shown that juries are not able to make "reliable sorting decisions among defendants with mental retardation" and juries have not "culled the more culpable from those whose disabilities [should] preclude a sentence of death." (Atkins Br. at 39). Not surprisingly, Atkins *has not cited a single case* in which a jury imposed a death sentence on a mentally retarded capital murderer who acted "without the level of culpability associated with the death penalty." *Penry*, 492 U.S. at 338.

Juries and courts, moreover, indisputably are capable of considering and giving full effect to "mitigating evidence of mental retardation in imposing sentence," *Penry*, 492 U.S. at 340, and distinguishing individuals with mild mental retardation from those who do not deserve the death penalty because of their mental disability. *See, e.g., State v. Best*, 467 S.E.2d 45, 54 (N.C.) (death sentence for defendant with I.Q. of 70 but employed and able to function in society), *cert. denied*, 519 U.S. 878 (1996); *State v. Skipper*, 446 S.E.2d 252, 277, 282 (N.C. 1994) (death sentence for defendant with I.Q. of 69, but who had been married for five years, worked in several jobs, and for seven years owned and operated a business that he sold for approximately $25,000), *cert. denied*, 513 U.S. 1134 (1995); *State v. Steen*, 536 S.E.2d 1, 19 (N.C. 2000) (death sentence for defendant with I.Q. of 70 to 79, but who was competent to manage financial transactions, had ability to understand, retain and follow instructions, oriented well to his job and duties, had good common sense, and, except for slow speech, was mentally alert, and had the capacity to premeditate and plan his crime), *cert. denied*, 531 U.S. 1167 (2001); *State v. Spruill*, 452 S.E.2d 279, 305

(N.C. 1994) (death sentence for defendant who, while immature and dependent with I.Q. of 72, had worked as automobile mechanic and in a shipyard, moved on to a better position, attended church and functioned quite well in the community), *cert. denied*, 516 U.S. 834 (1995); *Ex parte Borden*, 769 So.2d 950, 957 (Ala. 2000) (death sentence for defendant with I.Q. of 66, but who had ability to know and distinguish right from wrong and was not suffering from any mental disorder sufficiently severe to affect his motivation to commit the crime), *cert. denied*, 531 U.S. 961 (2000); *People v. Smithey*, 978 P.2d 1171, 1221-1222 (Ca. 1999) (death sentence for defendant with I.Q. of 70 who had obvious difficulty abiding by law and functioning successfully in society but nevertheless could communicate, take care of immediate personal needs, perform skilled labor, earn money, form friendships, drive and repair automobiles, and adapt well to living and working in prison), *cert. denied*, 529 U.S. 1026 (2000); *State v. Comeaux*, 699 So.2d 16, 37 (La. 1997) (defendant with I.Q. of 68 made no showing that degree of mental impairment coupled with young age rendered him incapable of acting at level of culpability required for imposition of death penalty), *cert. denied*, 522 U.S. 1150 (1998); *Hill v. State*, 953 P.2d 1077, 1083-1084 (Nev.) (death sentence for defendant with I.Q. of 60 as child and full scale I.Q. of 68 as adult, but who committed brutal crimes, could understand nature of proceedings, and knew difference between right and wrong), *cert. denied*, 525 U.S. 1042 (1998); *Jones v. Johnson*, 171 F.3d 270, 276 (5th Cir.) (even assuming that defendant's limited ability constituted severe handicap, defendant presented no evidence showing requisite nexus between his handicap and

the criminal act), *cert. denied*, 527 U.S. 1059 (1999); *King v. State*, 539 S.E.2d 783, 801 (Ga. 2000) (claim of retardation rebutted by evidence that King helped plan the crime, and coldly executed the victim); *State v. Brooks*, 648 So.2d 366, 377 (La. 1995) (death sentence for defendant with an I.Q. of 44 to 67, but who could drive a car and operate a forklift and expert testimony adduced that the I.Q. did not show full range of Brooks' ability).

There is simply no basis upon which this Court should accept Atkins' cynical hypothesis that juries are unable to discern a defendant's level of culpability. There is even less basis upon which the Court should allow the important decision of what punishment is most appropriate, considering both the crime and the defendant, to be dictated by an "expert" or, worse yet, some association of "experts" who may develop guidelines which have absolutely no connection to a particular defendant's individual culpability or capabilities.

B. There Is No National Consensus Against Execution Of The Mentally Retarded.

In 1989, the Court considered and rejected the notion that there was a "national consensus" against execution of mentally retarded capital defendants. *Penry*, 492 U.S. at 340. At the time of *Penry*, only one State had passed legislation prohibiting such executions, and only one other was about to do so. The Court held that "[w]hile a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the process of a maturing society,' there is insufficient evidence of such a consensus

today." *Penry*, 492 U.S. at 340. Atkins argues that the "someday" referred to in *Penry* "has arrived." (Atkins Br. at 40). According to Atkins, there now exists a national consensus because, since *Penry*, seventeen additional States have enacted statutes prohibiting the execution of capital defendants who are mentally retarded. Nevertheless, no *national* consensus exists against the execution of capital defendants who are mentally retarded but otherwise have the mental capacity to plan, premeditate and deliberate with a specific intent to kill, and thereafter carry out a capital murder.[21]

Eighth Amendment judgments are informed by objective factors. *Stanford*, 492 U.S. at 369. "This approach is dictated both by the language of the amendment – which proscribes only those punishments that are both 'cruel and *unusual*' – and by the 'deference [the Court] owe[s] to the decisions of the state legislatures under our federal system.' " *Id.* at 369-70 (emphasis in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 176 (1976)); *see Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

First and foremost among the objective indicia that reflect the public attitude toward a given punishment are the statutes passed by the state legislatures as society's elected representatives. *Stanford*, 492 U.S. at 370; *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Gregg*, 428 U.S. at 173. In deciding there was no national consensus

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[21] "Consensus" means agreement of opinion, testimony and so on. *The Concise Oxford Dictionary* 258 (5th ed. 1964). It is also defined as group solidarity in sentiment and belief, or a general agreement. *Webster's Ninth New Collegiate Dictionary* 279 (1983).

against the imposition of capital punishment on sixteen and seventeen-year-old capital defendants in *Stanford*, the Court noted that only fifteen States which authorized the death penalty declined to impose such punishment upon sixteen-year-old murderers and only twelve States declined to impose it on seventeen-year-old murderers. Twenty-two death penalty States, however, permitted sixteen-year-olds to be sentenced to death. *Stanford*, 492 U.S. at 370.

Similarly, twenty States continue to include mentally retarded persons in the death-eligible class. Indeed, of the thirty-eight death penalty States, only eighteen – less than a majority – have some sort of statute prohibiting the execution of mentally retarded capital offenders. "This [number] does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." *Stanford*, 492 U.S. at 370-371.

Of the eighteen States which have enacted laws against the imposition of capital punishment on defendants with mental retardation, eight expressly have made their laws prospective only.[22] And, the wording used in

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[22] The eight States with prospective-only laws are:

Arkansas: Under 1993 act, mentally retarded defendants who do not raise the affirmative defense of mental retardation are not exempt from execution. *See* Ark. Code Ann. § 5-4-618(d)(1) (a defendant "shall raise the special sentencing provision of mental retardation prior to trial"); *Reams v. State*, 909 S.W.2d 325, 327 (Ark. 1995) (mental retardation is an affirmative defense which will not be addressed on appeal if not properly raised at trial), *cert. denied*, 519 U.S. 832 (1996). *See also City of Cave Springs v. City of Rogers*, 37 S.W.3d 601 (Ark. 2001) (legislation is presumed to apply prospectively only unless

four other state statutes suggests that the laws do not apply to mentally retarded defendants upon whom a

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there is an express provision to the contrary in the legislation at issue).

Arizona: "This section applies prospectively only to cases in which the state files a notice of intent to seek the death penalty after the effective date of this Act [Apr. 26, 2001]." Ariz. Rev. Stat. § 13-703(j) (2001).

Florida: Florida Stat. § 921.137(8) (2001): "This section does not apply to a defendant who was sentenced to death prior to the effective date of this act [Jun. 12, 2001]."

Indiana: Mentally retarded capital defendants tried before July 1, 1994, are not exempt from execution. Ind. Code §§ 35-50-2-9 and 35-36-9-6 (1998); *Rondon v. State*, 711 N.E.2d 506, 512 (Ind. 1999) ("the General Assembly specifically legislated and the Governor signed into law a statute of repose for claims of mental retardation in capital cases tried before July 1, 1994.").

Kansas: Provisions of Kan. Stat. Ann. § 21-4623 "shall be applicable only to persons convicted of crimes committed on or after July 1, 1994." Kan. Stat. Ann. § 21-4631(c) (1994).

Kentucky: Mentally retarded capital defendants tried before July 1, 1990, are not exempt from execution. Ky. Rev. Stat. Ann. § 532.140 (1990); *Skaggs v. Parker*, 235 F.3d 261, 274 n.4 (6th Cir. 2000) (" . . . this statute, which became effective July 1, 1990, [ ]does not apply to Skaggs, who was tried in 1982 for murder"), *cert. denied*, 122 S. Ct. 322 (2001).

Maryland: Mentally retarded capital defendants sentenced to death prior to July 1, 1989, are not exempt from execution unless resentenced. Md. Code Article 27, § 412(f) (1989); *Booth v. State*, 608 A.2d 162, 174 (Maryland statute exempting mentally retarded from execution applies retrospectively to individuals awaiting trial or sentencing on July 1, 1989, and prospectively to any individual sentenced on or after July 1, 1989), *cert. denied*, 506 U.S. 988 (1992).

death sentence was imposed prior to the effective date thereof.[23] Thus, of the eighteen States which Atkins says "prohibit" the execution of mentally retarded capital murderers, at least eight, and arguably twelve, still allow for the imposition of capital punishment on some mentally retarded capital defendants.

The eight States which unequivocally permit the execution of some mentally retarded capital murderers simply cannot be included in the category of States which ban execution of mentally retarded defendants. The Legislatures of these States considered whether their laws

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Missouri: "The provisions of this section shall only govern offenses committed on or after August 28, 2001." Mo. Rev. Stat. § 565.030.7 (2001) (emphasis added).

[23] The four States which have laws that facially do not apply to mentally retarded defendants sentenced prior to the effective dates are the following:

Colorado: "A sentence of death *shall not be imposed* upon any defendant who is determined to be a mentally retarded defendant pursuant to section 16-9-401 [a section requiring a defendant to file a pretrial motion for determination whether he is mentally retarded]." Colo. Rev. Stat. § 16-9-403 (1993) (emphasis added).

Connecticut: No court or jury shall "*impose* the sentence of death" on a mentally retarded defendant. Conn. Gen. Stat. § 531-46b(h) (emphasis added). The Connecticut statute became effective on July 1, 2001.

South Dakota: The death penalty "*may not be imposed* upon any person who was mentally retarded at the time of the offense." S.D. Codified Laws § 23A-27A-26.1 (2000) (emphasis added).

Washington: Under 1993 change in law, defendants who were mentally retarded at the time the murder was committed shall not "be sentenced to death." Wash. Rev. Code § 10.95.030(2) (1993).

should apply to all mentally retarded capital defendants, and expressly chose only to implement a ban on the execution of some mentally retarded offenders. The decisions of these Legislatures to bar the execution of mentally retarded killers prospectively preserves the authority of these States to execute mentally retarded capital defendants who were convicted prior to the enactment of the respective bans. In effect, the prospective-only enactments create two categories of mentally retarded murderers: those who can be executed and those who cannot be executed. Because there is not even a consensus in these eight States against the execution of all mentally retarded murderers, they certainly cannot be used as proof of some sort of *national* consensus against the execution of mentally retarded capital defendants. Indeed, when these States are removed from the list of States prohibiting the execution of mentally retarded capital defendants, the number of States banning the execution of all mentally retarded killers falls to ten.[24]

Atkins' numeric manipulation is further illustrated by his use of New York as proof of a national consensus against execution of mentally retarded capital murderers. New York's statute specifically provides that a sentence of death "may not be set aside . . . upon the ground that the defendant is mentally retarded" if "the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution." N.Y. C.L.S. § 400.27.12(d) (1995). Thus, like the States which enacted prospective-only bans on the

[24] Of course, if Colorado, Connecticut, South Dakota and Washington are excluded, the number of States categorically prohibiting such executions falls to five.

execution of mentally retarded capital offenders, New York's law creates both death eligible and non-death eligible mentally retarded capital defendants. New York demonstrates a *lack* of consensus for a total ban on executions of mentally retarded capital defendants and lowers the number of States absolutely banning the execution of mentally retarded capital offenders to nine.[25]

"It is not the burden of [Virginia], to establish a national consensus approving what their citizens have voted to do; it is [Atkins'] 'heavy burden,' *Gregg*, 428 U.S. at 175, to establish a national consensus *against* it." *Stanford*, 492 U.S. at 373 (emphasis in original). Although Virginia has no burden here, it is significant that twenty States which presently have capital punishment have not affirmatively considered and legislated an enactment to ban mentally retarded murderers from death eligibility. Furthermore, Atkins' attempt to create a national consensus by adding the twelve States which presently do not authorize any capital punishment to the pool of death penalty States which prohibit execution of the mentally retarded must be rejected. The number of States without capital punishment may bear upon the question whether

[25] Tennessee also is a State that should not be counted on Atkins' side of the ledger on the "consensus" question. Tennessee's statute prohibiting execution of the mentally retarded is not retroactive and thus, it does not categorically prohibit the execution of all mentally retarded murderers. *See Van Tran v. State*, 2001 Tenn. LEXIS 820, *21 (December 4, 2001). However, despite the express will of Tennessee's citizens that execution of the mentally retarded be prohibited prospectively only, the Tennessee Supreme Court has held as a matter of federal and state constitutional law that mentally retarded murderers cannot be executed. *Id.* at *54-55.

a consensus against capital punishment exists in general, but it is irrelevant to the specific inquiry in this case: whether the execution of a capital defendant who is mentally retarded constitutes cruel and unusual punishment under the Eighth Amendment. *Stanford*, 492 U.S. at 370 n.2. (noting that non-death penalty States play *no role* in determining whether it is cruel and unusual to execute juveniles). The issue before the Court is not whether there is a national consensus for or against capital punishment; rather it is whether mentally retarded capital defendants should be exempt from capital punishment as a matter of constitutional law.

In any event, even if those States which have no capital punishment were included in the mix, the fact remains that at least twenty-nine, and perhaps as many as thirty-three, States have not categorically prohibited the execution of all mentally retarded capital murderers. Because so many States do not currently ban the execution of mentally retarded capital defendants, "there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for [the Court] to conclude that it is categorically prohibited by the Eighth Amendment." *Penry*, 492 U.S. at 335. *See Tison*, 481 U.S. at 154-158 (Court declined to find national consensus against imposition of death penalty for major participation in felony with reckless indifference to human life where only eleven States rejected its use in such circumstances).

Even in those States where the execution of mentally retarded offenders is prohibited, there are significant differences as to exactly who it is that is included under the protective umbrella of prohibition. For example, some States require the allegedly mentally retarded capital

defendant to have an I.Q. of below 70 and to display "substantial" deficits in adaptive behavior. *See, e.g.*, Ky. Rev. Stat. § 53.2-130-140 (1990). Other States also require an I.Q. below 70 but require the capital defendant to exhibit only "deficits" in adaptive behavior. *See* Neb. Rev. Stat. § 28-105.01 (2000); N.M. Stat. Ann. § 31-20A-2.1 (1991). Still others require a 65 or below I.Q. coupled with a "significant" impairment in adaptive behavior. *See* Ark. Code Ann. § 5-4-618 (1993); Ariz. Rev. Stat. § 13-3982 (2001). Some have no minimum I.Q. requirement and list as their sole requirement a "substantial" impairment in adaptive behavior, *see* Ind. Code § 35-36-9-1 (1994) et seq., or an "impairment" in adaptive behavior. *See* Ga. Code. Ann. § 17-7-131(1) (1988). The newness of these State laws as well as the wide divergence between them is reflective of the non-homogeneous nature of the mentally retarded and is further evidence that no national consensus against their execution exists.[26] *See Thompson*,

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[26] The differing approaches utilized by the States highlight the serious problem with using the psychiatric community's definition of mental retardation to form a constitutional rule. Psychiatric categorizations and definitions change. For example, the American Psychiatric Association at one time considered homosexuality to be a clinical mental disorder, *see* Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S.Cal.L.Rev. 527, 557 (1978), but did not consider sociopathy to be a mental disease. *See Blocker v. United States*, 274 F.2d 572, 573 (D.C. Cir. 1959). Because these categorizations and definitions regularly change, any constitutional rule founded upon them could be rendered obsolete by mental health professionals and without the benefit of a legislative or judicial act. And if the constitutional rule remained static despite a definitional shift within the psychiatric community, the constitutional rule would not be in keeping with the current standards and norms of the mental health professionals.

487 U.S. 859 (Scalia, J., dissenting) (noting that a purported national consensus must be "sufficiently uniform and of sufficiently long standing" to render a punishment cruel and unusual).

Left with no persuasive argument that the consensus of the American people – as reflected by the laws enacted by state legislatures – is soundly against execution of the mentally retarded, Atkins turns for support to the views of foreign countries and various interest groups, some of whom filed amicus briefs. In *Stanford*, however, this Court expressly "declined to rest constitutional law upon such uncertain foundations." *Stanford*, 492 U.S. 377. "A revised national consensus so broad as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." *Id.* As demonstrated above, only nine death penalty States, at most, ban the execution of *all* mentally retarded capital defendants. Twenty-nine death penalty States do not. Consequently, "[a]s far as the primary and most reliable indication of consensus is concerned – the pattern of enacted laws – [Atkins has] failed to carry [his heavy] burden." *Id.* at 373.

Moreover, in determining whether standards of decency have "evolved," this Court looks to the conceptions of decency of modern *American* society as a whole. *Stanford*, 492 U.S. at 369. The purported standards of decency of other countries are an inappropriate means of establishing the fundamental beliefs or national consensus of *this* Nation:

> The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well. But where there is not first a settled consensus among our own people, the views of other nations, . . . cannot be imposed upon Americans through the Constitution."

Thompson, 487 U.S. at 868-869 (Scalia, J., dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). That twenty-nine of the thirty-eight States with capital punishment presently do not categorically prohibit the imposition of capital punishment upon all mentally retarded capital defendants is determinative of the *absence* of a national consensus against such executions. Indeed, that number *resolves* the question before this Court, even if the resolution is inconsistent with the views or practices of other Nations. The fact that some or all foreign Nations agree with Atkins is no more relevant than that those Nations would not impose capital punishment at all, or may have standards of due process different from our own. *Thompson*, 487 U.S. at 868-69 n.4.

Atkins has presented this Court with no national execution statistics or national jury verdict data to shed light on whether application of capital punishment to mentally retarded murderers has been so abandoned that it should be considered unacceptable. *See Thompson*, 487 U.S. at 851; *Coker*, 433 U.S. at 592. He has not informed the Court of the number of mentally retarded murderers who actually have been sentenced to death since *Penry*

was decided in 1989. He does not indicate how many juries have declined to impose the death penalty on mentally retarded capital defendants or how many times prosecutors have exercised their discretion in refraining from seeking the death penalty in such cases.

Of course, even if Atkins had done so, as a practical matter statistics or data carry little weight in this regard because a "far smaller number of capital murders are committed" by capital defendants with mental retardation than are committed by defendants without mental retardation. *See Stanford*, 492 U.S. at 374 (noting that statistics regarding the number of juveniles actually executed had little significance when it was undisputed that a far smaller number of capital crimes were committed by those under age eighteen). Atkins simply has not established the proposition that capital punishment for mentally retarded killers is categorically unacceptable to prosecutors and juries. Without such data, the Court cannot reliably infer a consensus that juries are more reluctant to impose capital punishment on a mentally retarded capital defendant under the specific and individualized facts of a particular case, than on other murderers. *Id.*[27]

This Court is well aware, in any event, of the danger in inferring a settled societal consensus from statistics. In

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[27] Indeed, as this Court noted in *Stanford*, it is probable that the very considerations which induce Atkins and his supporters to believe that death never under any circumstances should be imposed on mentally retarded capital defendants in fact cause prosecutors and juries to believe that it *rarely* should be imposed. *See Stanford*, 492 U.S. at 374. Such a deduction, however, does not support the consensus necessary to the sea change in constitutional law espoused by Atkins.

Thompson, Justice O'Connor noted that, when the Court heard oral argument in 1972 in *Furman v. Georgia*, 408 U.S. 258 (1972), there had been a steady stream of States abolishing, or moving toward abolition, of the death penalty and executions had ceased completely beginning in 1968. *Thompson*, 487 U.S. at 855. Such statistics might have suggested that capital punishment "had become a relic implicitly rejected by a new societal consensus." *Id.* at 855. However,

> [the Court] now know[s] that any inferences of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.

Id. (O'Connor, J., concurring).

The fact remains that a majority of the States which provides for capital punishment still permits it to be imposed upon mentally retarded capital defendants. "While a national consensus against execution of the mentally retarded may someday emerge reflecting the evolving standards of decency that mark the progress of a maturing society," *Penry*, 492 U.S. at 340, it has not yet done so.

III. ATKINS IS NOT A MENTALLY RETARDED CAPITAL DEFENDANT.

As Atkins' amicus APA admits, a diagnosis of mental retardation requires three things: significant subaverage intellectual functioning, concurrent deficits or impairments in present adaptive functioning in at least two of eleven areas,[28] and an onset before the age of eighteen. *See* Brief of amicus APA at 13; DSM-IV-TR at 49. Even if Atkins could meet the first two requirements, he *never* was diagnosed as mentally retarded before the age of eighteen.[29]

Only his court appointed expert, Dr. Evan Nelson, found him to be mentally retarded, and this was immediately prior to his capital murder trial.[30] Furthermore,

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[28] The DSM-IV-TR identifies these areas as: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. DSM-IV-TR at 49.

[29] Atkins' amicus APA also argues that, like with biological age, there is no "line-drawing problem" in forming a constitutional rule against executing the mentally retarded because "individuals with mental retardation form a well-demarcated group that is defined by . . . deficits in both intellectual and adaptive functioning." (Br. for amicus APA at 11-12). That clearly is not the case. Like the population at large, the mentally retarded are a heterogeneous group and, unlike with biological age, experts certainly can, and in Atkins' case actually did, disagree about whether an individual is mentally retarded.

[30] According to amicus APA, a diagnosis of mental retardation is appropriate only after *two* qualified mental retardation professionals separately administer diagnostic tests and reach identical conclusions that the tested individual is mentally retarded. (*See* Br. of amicus APA at 13.)

Nelson never specifically identified, as the DSM-IV-TR requires, any deficits in Atkins' present adaptive functioning. Rather, as Atkins admits (Atkins Br. at 43), Nelson opined only that Atkins had demonstrated a "lack of *success* in pretty much every domain of his life." (JA 442, emphasis added).

Nelson's conclusion, however, is insufficient to establish that Atkins' adaptive functioning was impaired to any extent let alone to the extent required for him to be classified as mentally retarded under the DSM-IV-TR. *See* Brief of amicus APA at 18 (A diagnosis of mental retardation "must be made by qualified mental retardation professionals who conduct a complete mental retardation evaluation adequately covering all three necessary criteria for diagnosis"). *See also Atkins II*, 534 S.E.2d at 320 ("Dr. Nelson never identified an area of significant limitation in Atkins' adaptive functioning other than what he termed Atkins' 'academic failure.' ").

On the other hand, Dr. Samenow expressly found that Atkins had "no lack of ability to adapt and to take care of [his] basic needs." (JA 484). Atkins, for instance, could wash his own clothes and cook. In addition, Atkins could make change and utilize the public transportation system.[31]

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[31] Atkins dismisses Dr. Samenow's testimony that there were no deficits in Atkins' adaptive functioning by alleging that Samenow's conclusion rests on nothing other than Atkins' "inflated" self-report. (Atkins Br. at 47). But Atkins did not just tell Samenow that he could cook. He actually provided

Dr. Samenow also disagreed with Dr. Nelson's conclusion that Atkins possessed subaverage intelligence. According to Dr. Samenow, Atkins was of "average intelligence, at least." (JA 476). Dr. Samenow explained that his opinion differed from Nelson's because, when Dr. Samenow administered a battery of tests to Atkins, he "pushed" Atkins "just a little" to think harder or explain his answers further. When pushed, Atkins gave Samenow a "more sophisticated answer" or "a fuller response indicating that he had a better understanding . . . than he had indicated with Dr. Nelson." (JA 479). Samenow explained that Atkins' demonstrated ability to perform better when "pushed" was consistent with notations contained in Atkins' school records, which indicated that Atkins lacked motivation, did not concentrate, and could do better in school than his academic performance indicated. Samenow summed up Atkins' school records as showing an individual who "chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do." (JA 481). Samenow concluded that Atkins' poor performance in school "wasn't a matter of a lack of ability. It was a matter of a lack of performance." (JA 536a).[32]

Samenow with his own recipe for cooking chicken. And Atkins did not just tell Samenow he could make change. He demonstrated this ability by correctly answering Samenow's mathematical questions about money. (JA 480).

[32] Indeed, Nelson's opinion that Atkins demonstrated a "lack of success in pretty much every domain in life" is consistent with a lack of motivation and Samenow's conclusion that Atkins was a person who simply "did not want to do what he was required to do." In other words, Atkins lacked success in

Dr. Nelson, on the other hand, despite having reviewed Atkins' academic records which expressly documented Atkins' lack of motivation, assumed that Atkins' initial responses to the various test questions was the best that Atkins could do. He, thus, labeled Atkins as mentally retarded despite the fact that Atkins can and did perform better on the tests than his own testing had indicated.

Samenow additionally offered other evidence that Atkins possessed at least average intelligence: Atkins was knowledgeable about current events; knew when John F. Kennedy had been President; could put together stories with "cause, effect, past, present and future;" talked freely, "developed ideas and concepts;" and used sophisticated words "correctly in syntax." (JA 536). Atkins admits that language usage correlates with general cognitive ability and states that individuals who truly are mildly mentally retarded have "substantial deficits in the complex area[ ] of . . . syntax." (Atkins Br. at 48-49 n.55). Atkins, however, has no deficits in "the complex area of syntax." According to Dr. Samenow, Atkins' vocabulary not only was extensive and "sophisticated," he used that vocabulary "correctly" and "in syntax." (JA 536).

Because Atkins is not a mentally retarded person, resolution of the Eighth Amendment issue cannot "affect the behavior of the [Commonwealth] towards [Atkins]." *See Lawyer v. Department of Justice*, 521 U.S. 567, 579 (1997); *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Even if this Court were to decide that execution of mentally

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life not because he was mentally retarded but because he was not motivated to succeed.

retarded capital murderers is unconstitutional, Atkins' execution would not be prohibited because *he is not a mentally retarded capital murderer.* There is, therefore, no case or controversy and resolution of the Eighth Amendment question in this case would amount to nothing more that an improper advisory opinion. *Helms*, 482 U.S. at 761.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

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